72-1395

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IN THE

Supreme Court of the United States

October Term 1972

No. 72-1395

GRIFFIN & BRAND OF McALLEN INC., *Petitioner*

v.

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Respondent*

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

H. H. RANKIN, JR.
RANKIN, KERN & MARTINEZ
P. O. Box 3592
McAllen, Texas 78501

Attorneys for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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GRIFFIN & BRAND OF McALLEN, INC., PETITIONER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 4, 1973.

OPINION BELOW

The opinion of the District Court for the Southern District of Texas, Brownsville Division, is reported at 68 LC #32682. The opinion of the Court of Appeals for the Fifth Circuit is reported at both 70 LC #32820 and 471 F.2d 235.

JURISDICTION

The District Court for the Southern District of Texas, Brownsville Division, entered an opinion on March 31, 1972, a copy of which is appended to this petition in the Appendix at page 36, and entered its judgment on April 20, 1972, a copy of which is appended to this petition in the Appendix at page 44. The opinion of the Court of Appeals for the Fifth Circuit was rendered and entered on January 4, 1973, a copy of which is appended to this petition in the Appendix at page 25, as was the judgment of the Court, a copy of which is appended to this petition in the Appendix at page 33. An extension of time in which to file a Motion for Rehearing until February 12, 1973, was granted on January 15, 1973, and a Motion for Rehearing In Banc was duly filed, which the Court of Appeals for the Fifth Circuit denied, by an Order entered on March 9, 1973, a copy of which is appended to this petition in the Appendix at page 35. The Mandate was stayed until April 21, 1973, by an Order dated March 22, 1973, pursuant to a Motion to Stay the Mandate.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The "crew leader system" is virtually the only system used by the farmer and processor in harvesting fruit and vegetables throughout substantially all of the agricultural producing areas of the United States. In 1966 agricultural employees became subject to the Fair Labor Standards Act for the first time. Shortly thereafter an administrative determination was requested as to whether the "crew

leaders" were Independent Contractors for purposes of the Fair Labor Standards Act, thus making the harvestors the crew leaders' employees, or whether they were the employees of the farmer or processor, such as the PETITIONER. The written administrative determination made by the Labor Department at that time and circulated among the agricultural industry to the effect that crew leaders were and could be Independent Contractors under the Fair Labor Standards Act, and this administrative determination is now challenged by the Labor Department in this case.

PETITIONER, who operates farms in the lower Rio Grande Valley and Wintergarden areas of South Texas, and processing plants in the lower Rio Grande Valley, relied upon the written administrative determination made by the United States Department of Labor as well as their attorney's advice in resisting the Wage and Hour investigator's insistence that the crew leaders were not Independent Contractors and his harvestors were PETITIONER'S employees.

As a result of PETITIONER'S position, the Department of Labor instituted a suit against PETITIONER for an injunction to keep the PETITIONER from violating the minimum wage, child labor, and record keeping provisions of the Fair Labor Standards Act, and for recovery on behalf of all the harvestors employed by the crew leaders of wages due and owing as a result of their failure to be paid in accordance with the provisions of the Fair Labor Standards Act though this portion of the suit was later dropped. The admitted purpose of the suit was to determine whether the harvest hands who worked for crew leaders retained by PETITIONER were employees of PETITIONER, or were employees of the

crew leaders who were Independent Contractors as the Labor Department's unretracted official opinion stated they were, under the terms of Fair Labor Standards Act. The District Court, in deciding this case, noted that the determination of this case will determine this question for not only PETITIONER but for all other farmers and processors in South Texas.

The questions presented in this application are:

(1) Are employees of a business which renders a harvesting service to the agricultural industry also employees of the farmer or processor who retained the harvesting service and for whom said crew leader rendered his services?

(2) Did the opinion of the District Court and Fifth Circuit completely ignore previous holdings of this Honorable Court and other circuit courts which set forth the factors, the totality of all which must be considered in determining whether under the Fair Labor Standards Act an Independent Contractor or employment relation was presented?

(3) Whether PETITIONER, who in good faith relied upon administrative decisions of RESPONDENT, as well as its attorney's advice to the fact that the harvestors employed by the "crew leaders" were under the Fair Labor Standards Act Independent Contractors and their harvest hands their employees and not employees of PETITIONER, should have an injunction issued against it when the Courts change completely the previous written and official administrative determination made by RESPONDENT.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent portions of the Statutes are 29 *U.S.C.* 203(d), (e), (g), and (l); 206(a) and (a)(5); 211(c); 212(a), and (c); 213(a), (a)(6)(a), and (c)(1); 215(a), (a)(1), (a)(2), (a)(4), and (a)(5); and 217, all of which are portions of the Fair Labor Standards Act. The pertinent portion of the Rules and Regulations of the Wage and Hour Division, United States Department of Labor, is the official interpretation of the question presented by this application, *Opinion Letters 640 and 658*. The Statutes and opinion Letters are appended to this application in the Appendix beginning at page 46.

STATEMENT

This suit was originally brought in behalf of the United States Department of Labor pursuant to Section 17 of the Fair Labor Standards Act, 29 *U.S.C.* 217, for an injunction to restrain PETITIONER from violating certain portions of Section 15, Fair Labor Standards Act, 29 *U.S.C.* 215, specifically subsections (a)(1), (a)(2), (a)(4), and (a)(5) concerning the employers' responsibility for payment of minimum wage, child labor, and record keeping.

Almost all vegetables and fruits in this country are havested by employees of "crew leaders." In the Mississippi River basin a large portion of the crew leaders are based in the lower Rio Grande Valley where PETITIONER conducts most of its operations. PETITIONER engages crew leaders for harvesting over a period of several months during the year on a day to day basis. During the remainder of the year the crew leaders in

question are working in different areas of Texas and other states in the United States for other farmers or processors.

PETITIONER handles its employment of the crew leaders through its chief fieldman. The crew leaders will call upon PETITIONER'S chief fieldman each afternoon to find out what crop is to be harvested the following day (App. 334, 346, 348 & 390), the fields out of which each is to harvest (App. 286, 309, 334, 346, 734-738 & 783), the price to be paid to them by PETITIONER per unit (App. 730), and the time of day operation is to commence (App. 349, 389 & 392).

On large fields, more than one crew would be harvesting with each crew being assigned a different row (App. 287, 347 & 391). During the day fieldmen for PETITIONER would check the progress of the work (App. 392), give truck tickets (App. 337), and advise the crew leader of the number of truck loads still needed (App. 349 & 393). The crew leaders supervise their harvest hands; the hiring and firing of the hands (App. 306 & 366); seeing that bad vegetables or fruit are eliminated from the harvest (App. 374); determine the size of their crew (App. 228-320); determine their hands' pay period (App. 306); determine whether, for example, the onions should be immediately sacked or dried first (App. 393); and furnished the harvesting equipment used by his harvesting employees (App. 307, 367-369, 693, 702 & 723). PETITIONER'S employees never supervised the harvest hands in any manner, never criticized their work, or gave them any instructions, but took any criticism, requests and other problems to the crew leaders who took whatever action he deemed appropriate (App. 310-311, 366 & 368).

All of the crew leaders did a bulk of their work throughout the mid-west in areas far from South Texas though they followed the same procedure with other farmers and/or processors as they do with PETITIONERS, (App. 361-362, 363-365, 303-305, 314-315, & 724-725). All of the crew leaders performed harvesting services for many different organizations and persons in the agricultural industry in South Texas and in other parts of the United States.

The crew leaders each own from one to three 2½ ton trucks costing in excess of $5,000 each, which they purchased and maintain themselves for use in their harvesting business (App. 304, 367, 412, 691-692, 694, 701-702, 710, 713, 722 & 726). Some even own busses for transporting their crews to and from the place of employment (App. 722-723). As already noted, the crew leaders own the harvesting equipment. During a full week each can clear, by operating two trucks, from around $300.00 (App. 693-695) to $500.00 or $600.00 by operating three trucks (App. 718-719, & 724-725).

Crew leaders used by PETITIONER in harvesting in 1971 did up to roughly sixty days work for PETITIONER and received, according to the IRS 1099 form, which also contained the crew leaders' employer's identification numbers (App. 643 & 745-746), from $25,355.33 to $50,896.85 (App. 758-759 & 781). Of course the crew leaders also filed an income tax return as a proprietor of a business (App. 636-638, 641-642, 650 & 685).

The crew leaders individually insisted that they were independent businessmen and that their earnings depended upon how efficiently they ran their businesses (App. 369-375, 703-704, 691, 711, 725 & 786).

The crew leaders operated out of their homes (App. 372, 377 & 715) without the benefit of a separate office (App. 284, 344, 388, 699-700, 715 & 727). Some of them operated without using a bank account (App. 284, 288, 388, 698 & 716), though some did use bank accounts (App. 704 & 727). Many of the crew leaders paid their hands daily since the hands were often recruited for only the day from Mexico, though the crew leaders were only paid weekly by PETITIONER. Most crew leaders solved the resulting cash flow problem by having PETITIONER advance them funds from one to three times a week, provided they were working with PETITIONER during that week, out of which they paid the harvest hands (App. 290-292, 332, 396-397). Occasionally a crew leader would borrow money from PETITIONER, whose operation is in the same area as the crew leader's permanent residence, for various purposes and periods of time (App. 312, 393, 397, 403, 717 & 727).

PETITIONER also furnished payroll forms to the crew leaders and requested them to complete, maintain, and return a copy of the records to PETITIONER in order that the Social Security and other laws could be complied with (App. 296-297, 356-358, 377, 403-405, 406, 655-658, 664-665, 733-734 & 735-736). PETITIONER also held the crew leaders' and their employees' Social Security tax in escrow. The PETITIONER had assisted the crew leaders in their employment of a bookkeeper to whom a copy of the payroll records would be sent each week. The bookkeeper would keep the records necessary for the Social Security and compile the Social Security tax return annually for the crew leaders' operation with PETITIONER. PETITIONER would pay out of the escrow

fund the amount of tax it was instructed was due by the bookkeeper, with the bookkeeper being paid his fee out of the excess in the escrow fund and the balance being refunded to the crew leader (App. 646, 648-649, 688-689, 670-671, 681-682, 686-687 & 776-777).

PETITIONER, who had been investigated several times by the Wage and Hour Division, had a perfect record as far as its own employees were concerned (App. 506-507, 632-633, 634, 653-654 & 763-764); though the status of the harvest hands was disputed. The PETITIONER, though maintaining that the crew leaders were Independent Contractors for purposes of the Fair Labor Standards Act, citing the advice of its attorney and the two administrative opinions issued by the Wage and Hour Division (App. 749-751, 764-765 & 771-772), attempted to do everything it could to cooperate, especially because of the problem presented by the "hot goods" provision of the Fair Labor Standards Act. The payroll forms were devised and revised several times in cooperation with the representative of the Wage and Hour Division because they were told by RESPONDENT'S investigator that this would keep PETITIONER from violating the "hot goods" provision of the act and because they desired to cooperate with the government and particularly RESPONDENT (App. 623-625, 627-628, 655-658, 747-749, 751-752, 768-776, & 790).

PETITIONER'S business involves growing crops on land which they own or lease, buying growing crops which are owned by others, all of which are processed and sold by grade and quality, and acting as marketing agent for crops produced and processed by others (App. 270-271).

This case is unusual in one aspect and it is that for all practical purposes there was no dispute as to the above

facts so there is no question of the Trial Court finding the facts against PETITIONER. It is a question of law, whether under these facts the crew leaders' employees could also be the employees of PETITIONER.

REASONS FOR GRANTING THE WRIT

After the agricultural industry became subject to the Fair Labor Standards Act by amendment in 1966, the question soon arose concerning the status of the crew leaders and more specifically that of the harvest hands which the crew leaders employed. Were the crew leaders Fair Labor Standards Act Independent Contractors, or were they not? Were the harvest hands employees of the farmer or processor using their crew leaders, or were they not? Since crew leaders were used throughout most of the agricultural producing areas of the United States, this was a question of utmost importance to the agricultural industry. The question was presented to the Wage and Hour Division whose opinion was asked. The Division administrator answered the question with *Opinion Letter 640* which he supplemented approximately a month later with *Opinion Letter 658,* in which he discussed some of the factors which the Courts have stated should be used to determine whether a FLSA Independent Contractor relationship existed and found that the crew leaders were FLSA Independent Contractors, whose employees were not the employees, nor the responsibility, of the farmer or processor employing the crew leaders. Those two opinion letters are appended to this brief beginning at page 50. Said opinion letters have not been retracted, revoked or modified, yet the Labor Department has filed several suits asking the Courts to determine that the farmer and processor are the employers of the harvest hands working for

the crew leaders and that the crew leader is not a FLSA Independent Contractor.

This case has been the first to go through the trial and appellate stages and hence will be the determinative case for the agricultural industry of this country. If the PETITIONER is the employer or joint employer of the harvest hands working for the crew leaders it retained, then every other farmer or processor in the United States who uses a crew leader is at least a joint employer of said crew leaders' harvest hands as far as the Fair Labor Standards Act is concerned. The Trial Court, and Circuit Court, in holding that PETITIONER, GRIFFIN & BRAND OF McALLEN, INC., was the employer of the harvest hands, appeared to take the position that the crew leader was also an employer of the field hands, creating a joint employer relationship; yet the PETITIONER is still left with the responsibility of keeping the records for the harvest hands, paying the harvest hands, and supervising the harvest hands to protect themselves under this Court order, as will every other farmer or processor in the agricultural business. This eliminates the crew leader, yet leaves the problem of recruiting hundreds and thousands of harvest hands, transporting them to the harvest, and more importantly, supervising the hands and keeping the necessary records. The duration of the effort is only for a few weeks at differing times during the course of the year, which must be handled by a mere handful of permanent personnel who are numerically and woefully inadequate to handle such a multitude of people. Certainly PETITIONER will not have the problem in recruiting and transporting harvest hands that most farmers and processors throughout the country will have because they are in the base area for such harvest

hands. Obviously, the effect of refusal to grant the writ will be to substantially increase the size and complexity of any farming operation as well as the cost, which must be passed along by further increase in the price of food.

Undoubtedly a great deal of emphasis will be placed upon the broad definition of employer-employee with the Fair Labor Standards Act and the question asked, "Surely this is broad enough to include the PETITIONER'S relationship with the harvest hands." Without the application by the Courts of common law, common sense, and a large measure of social conscience, the definitions within the Fair Labor Standards Act is only a redundant non-definitive definition somewhat more vague than "a rose is a rose is a rose." It is the decision law which gives meaning to the statute. Admittedly something was intended by Congress more than the common law master-servant relationship since this definition can easily be construed to "encompass all employed humanity," *Walling v. Sanders,* 136 F.2d 78 (6th Cir., '43). However, this Court has long made it clear in referring to the definition of employer-employee relationship that "this does not mean that all who render a service to an industry is an employee," *United States v. Silk,* 67 S.Ct. 1463, 331 U.S. 704 (Sup Ct., '47) This Court has set out a variety of factors to be considered in determining whether the employee is the employee of the industry or of another person, an Independent Contractor. If under these tests an Independent Contractor is not a FLSA Independent Contractor, the employee is an employee of the industry, but if he is the employee of a FLSA Independent Contractor he is not the employee of the industry, a matter which cannot be circumvented by calling him a joint employee.

The tests set out by this Court in the leading cases, *Rutherford Ford Corp. v. McComb,* 67 Sup. Ct. 1473, 331 U.S. 722, (Sup. Ct., '47); and *United States v. Silk, supra,* are (1) the amount of control of the industry; (2) the contractor's opportunity for profit or loss; (3) the contractor's investment in equipment and facilities; (4) the permanency of the relationship between the industry and contractor; (5) the skill required by the contractors; (6) how integral a part of the industry's operation is the contractor's operation; (7) whose equipment and facilities are used by the contractor in performing his service; and (8) whether the contractor's business organization could shift its operation from place to place. In another case decided the same year, this Court stated that the custom within the industry was yet another factor to be considered. *Walling v. Portland Terminal Company,* 67 Sup. Ct. 639, 330 U.S. 148 (Sup. Ct., '47). The Fifth Circuit has added to these factors by determining (1) who controls the hiring, firing and employment conditions of the contractor's employees, and (2) whether the contractor can refuse to work for the company and work for others. *Wirtz v. Lone Star Steel Company,* 405 F.2d 668 (5th Cir., '68).

The crew leader has sole control over the hiring and firing of his employees. Not only can he refuse to work for PETITIONER and work for others in the same or different areas, they regularly carry on their contract harvesting business all over the United States and transport their entire business organization from place to place depending upon where harvest is in process during each year. Since the crew leaders have the option whether to work for PETITIONER or not, and do work for other farmers and processors in South Texas and the rest of the United States, their contracting with PETITIONER does

not have the permanency of relationship required for employer or employee relationship. There can be no doubt but that the custom of the agricultural industry is that the crew leaders are Independent Contractors. It is obvious by these five factors, without further discussion or elaboration, that the crew leaders in this case meet the FLSA requirements.

All of the crew leaders have an investment of at least $5,000 as represented by one field truck, not including the investment that most have in two or three field trucks and even bussess for transporting the crews. In addition, they have investments in the harvesting equipment, though somewhat small when compared to the investment in the trucks. It has been settled by this Court as well as other Courts that the ownership of just one truck is a sufficient investment to show a FLSA Independent Contractor relationship. *United States v. Silk, supra; Wirtz v. Lone Star Steel Company, supra; Goldberg v. Warren Brothers Road Co.*, 207 F. Sup. 99 (Maine, '62); *Wirtz v. Manchester Sand, Gravel & Cement Co.*, 236 F. Sup. 885 (N. Hamp., '64).

The uncontradicted testimony of the crew leaders, as well as others familiar with the agricultural industry, agreed that the crew leaders had to exercise initiative, skill, and foresight to be successful. It was exercised in the selection of trucks and equipment to be used and in their maintenance; the control and supervision of the harvest hands; and in selection of the areas where the harvest should be covered. Obviously the crew leader's income depended partially upon the amount of work he handled. This also meets the requirement for a FLSA Independent Contractor.

The evidence of opportunity for profit or loss is not clear cut as the crew leaders tended to minimize what

they made from their business; yet each of the crew leaders, besides owning the trucks and equipment used in their business, own their own homes, one or more cars and pick-up trucks, and one testified he even owned a farm. Another was sending three of his sons, none of which were working, to college, for each of whom he had purchased an automobile. While none of the crew leaders are wealthy, they are not any different from any other small businessman, especially ones who have not had more than one or two years of school, if any, and have a great deal of difficulty communicating in the English language.

The question of whose equipment and facilities are used is conflicting. On one hand, the equipment and trucks used belong to the crew leaders, while on the other hand they are harvesting crops grown by PETITIONER or which PETITIONER has purchased or is handling for its owner. Certainly to the extent of the equipment used, a FLSA Independent Contractor relationship is indicated. The question of ownership of the field or crop fits better into the test of it being an integral part of PETITIONER'S operation. Since PETITIONER'S business is growing, processing, and selling vegetables, the harvesting of the vegetables is an important element in its business. Yet it is not a specialized step in a production line as was present in *Rutherford Food Corp. v. McComb, supra.* It has been held that a similar operation, the harvesting of trees for processing into lumber, that the contractor's harvesting the trees was not an integral part of the lumber company's operation under the facts. *Wirtz v. Kneece,* 249 F. Sup. 594 (S. Car., '66).

The only remaining test is that of control. Basically the evidence was the PETITIONER'S control of the har-

vest was limited to determining the task to be done and establishing its perimeters, all of which was necessary to coordinate the flow of harvested crops into their processing plants. This included such steps as what of the crops to harvest, what fields or section of fields to be harvested, and the number of truck loads needed during the day. It did not include the control of the harvest hands, whether they were employed, or how they did their job, all of which was left up to the crew leaders. This is very unlike the only other recent case which has been decided involving crew leaders. *Hodgson v. Okada,* 472 F.2d 965 (10th Cir., '73). The Tenth Circuit in its opinion of February 7, 1973, noted that:

> "Paul Okada's father, Eddie, worked in the cucumber field almost daily. He instructed Ramon's crew how to perform their work. Eddie Okada directed Ramon not to rehire certain lazy workers and he told Pedro Medelez that if he didn't want to work he could leave,"

all of which items of control are not even remotely presented by this case.

The closest PETITIONER came to exercising undue control over the harvest hands, similar to that over an employee, was the furnishing of and requiring the payroll forms, the system instituted to see that the Social Security tax was paid for the harvest hands, and the setting of a minimum piece rate for the harvest hands. Though the latter matter was the only fact dispute in this case, for the purpose of this appeal it must be taken as established.

Without even attempting to explain these items, they are insufficient to show a FLSA employment relationship as far as the factors of control are concerned under past

judicial decisions, including those of this Court. In all of the "trucker" cases a great deal of control was exercised over the "trucker." The Gray Van Line required the "trucker" to have the company's name on his truck, required him to personally drive the truck unless he got prior company approval for a substitute, required him to comply with extensive company rules and regulations, required him to take a training course, told him where to load and unload, required him to be a member of a union, and required him to report to the company at preset intervals during a trip. *United States v. Silk, supra; Goldberg v. Warren Road Co., supra; Wirtz v. Lone Star Steel Co., supra.*

In yet another case the company would tell the FLSA Independent Contractor's employees, the janitors, what needed to be cleaned in addition to the janitor's ordinary duties and would criticize the quality of their work. *Wirtz v. San Francisco & Oakland Helicopter Airlines, Inc.*, 244 F.Sup. 680 (Calif., '65) aff'd. per curiam 370 F.2d 328; *Dugas v. Nashua Mfg. Co.*, 62 F.Sup. 846 (N. Hamp., '45). Certainly if such control is that of a FLSA Independent Contractor relationship as it was in these cases, the control here is most certainly that of a FLSA Independent Contractor.

Further, there is a rational reason for the action taken by PETITIONER, which could be considered undue control, which is consistent with a FLSA Independent Contractor relationship. Not only was the PETITIONER requested by the Labor Department to assist the crew leaders in complying with the FLSA, they were advised that it was necessary to avoid being in violation of the "hot goods" section of the Fair Labor Standards Act, due to the crew leaders failing to pay minimum wage. Under the

Wirtz v. Lone Star Steel Co., supra, case, the Fifth Circuit requires a business to take affirmative action, including investigating the books and records to guarantee that an Independent Contractor paid his employees in accordance with 29 *U.S.C.* 206. In view of such background it certainly is necessary for the PETITIONER to require payroll forms to show that the harvest hands were paid the minimum wage and logical to set a piece rate to see that they received the minimum wage and thereby avoid handling "hot goods" even though the crew leaders were FLSA Independent Contractors and the harvest hands were not PETITIONER'S employees. The matter of the Social Security tax was only an attempt by PETITIONER to be helpful and show a social conscience after several crew leaders had requested assistance in dealing with the Social Security tax which, due to their lack of educational background and language barrier, presented a problem, particularly with the government forms and technical requirements.

There is still another indisputable reason why the harvest hands are not PETITIONER'S employees under the FLSA. It is the prior administrative rulings of RESPONDENT which are set forth in formal opinions of RESPONDENT, *Opinion* 640 and *Opinion* 658, and included in the Appendix, holding that crew leaders are FLSA Independent Contractors. This Honorable Court, in *Roland Electrical Co. v. Walling,* 66 S.Ct., 413, 326 U.S. 657 (Sup. Ct., '45); and in *United States v. American Trucking Ass'n.,* 310 U.S. 534, 549, 60 S.Ct. 1059, 1069; has held that in determining the meaning or extent of coverage that interpretation by the Wage and Hour Division that "In any case such interpretations are entitled to great weight."

There are only two cases other than *Hodgson v. Okada, supra,* which has already been pointed out as inapplicable, which deals with a harvesting situation. *Mitchell v. Hertzke,* 234 F.2d 183 (10th Cir., '56), deals with the employer status of the crew leaders, the farmer, and the processor which purchased the crop and for whom the crop was being harvested. The Court held that the crew leader and farmer were employers of the field hands without any discussion of this aspect of the case, but held the processor was not an employer. The processor controlled the growing and harvesting of the farmer's string bean crop from before it was planted, and recruited and made available to the farmer crews, though the farmer did not have to use them, but the processor, as in this case, was not concerned with the number of hands involved, nor did he control the hiring and firing of the field hands. The same basic situation is present in *Hodgson v. Okada, supra,* with the exception that it was clear that the farmer was supervising, directing, and even discharging the field hands, unlike here, and the processor was not a party to that case.

The other harvesting case involved the harvesting of trees, *Wirtz v. Kneece, supra.* Here the contractor would cut the trees and saw them into boards the size requested by the lumber company, for which he would be paid so much per thousand board feet. He had an investment of $10,000 in equipment, excluding a portable saw mill which he would rent from the lumber company. Generally the contractor would work for the same lumber company throughout the year, yet they were FLSA Independent Contractors. Certainly these harvesting cases show that there is a FLSA Independent Contractor relationship in our case.

There does not seem to be any area where it is better established that a FLSA Independent Contractor relationship existed than the "trucker" cases. In this connection the owner of a truck will furnish his truck and services to a company and subject himself to extensive control by the company such as has already been discussed. They have investments from $2,500 up to $15,000, with their compensation being so much a unit, such as a mile. Their gross is often in the neighborhood of $15,000. Usually the company for which the work is done requires the trucker to comply with extensive rules and regulations, often the name of the company must be on the truck, and they are forbidden to work for anyone else. It is not uncommon for the company for which the trucker works to provide them some financing, though invariably the trucker has purchased his truck or trucks on his own. *United States v. Silk, supra; Wirtz v. Lone Star Steel, supra; Wirtz v. Manchester Sand, Gravel & Cement Co., supra; Goldberg v. Warren Brothers Road Co., supra; Goldberg v. Bellotto*, 207 F.Sup. 499 (Fla., '62); *Durkin v. Pet Milk Co.*, 115 F.Sup. 628 (W. Ark., '53). The only difference presented by this case is that the crew leader and his crew, besides loading and transporting the load will also gather the load to be transported by harvesting a crop. It is logically imperative that if the truckers are FLSA Independent Contractors, as this Court and other Courts have held, that the crew leaders must also be FLSA Independent Contractors.

Under the judicial constructions of the Fair Labor Standards Act, the harvest hands employed by the crew leaders who contracted with PETITIONER are employees only of the crew leader and not an employee, joint or otherwise, of PETITIONER, a conclusion which was

reached by RESPONDENT'S administrative determination. Yet RESPONDENT is now contending the opposite of their prior position. It would appear that RESPONDENT has decided for some reason that it desires to extend its scope, power, and authority. In making the attempt they do not care to consider the administrative determination that they had heretofore made, nor to apply the factors the Courts have determined should be considered to logically and correctly determine the results of this case since both inescapably lead to the decision that the crew leaders are FLSA Independent Contractors and their employees, the harvest hands, are not employees, joint or otherwise, of the PETITIONER.

The Trial Judge correctly stated that this decision would control the entire agricultural industry in the United States in its application. This is and was the test case chosen by RESPONDENT to achieve its goal of overruling and changing its own previous administrative determination of this very question and to obtain the stamp of judicial approval thereon. This question, which will be determined by this case, is of great importance to the agricultural industry throughout the country and as such certainly deserves consideration by this Honorable Court.

As has been demonstrated, the Trial Court, with the approval of the Circuit Court, disregarded the prior decisions of this Honorable Court, and the administrative rulings of Respondent (Wage & Hour Division U. S. Labor Department) and in effect held that employees, the harvesters, of a crew leader, were for the purpose of the F.L.S.A. employees whomever contracted with the crew leader though under prior judicial and administrative decisions the crew leaders were Independent Contractors

under the F.L.S.A. and the harvest hands were solely those of the crew leader. With this erroneous concept of law and fact, the Trial Court had to determine whether under the Act and prior decisions an injunction should be issued against PETITIONER to keep it from violating the F.L.S.A.

Here the PETITIONER had a perfect record of compliance with F.L.S.A. and relied on prior administrative rulings of the Wage & Hour Division of the Labor Department and on its then attorney's advice that the harvesters employed by the crew leaders were not PETITIONER'S employees; and followed the advice and directions of a F.L.S.A. Investigator in preparing a form to require the crew leaders to complete so PETITIONER could avoid any question or problem regarding the "hot Goods" section of the F.L.S.A. The only problem arose when PETITIONER chose to abide by the written administrative rulings of the Wage & Hour Division of the U. S. Labor Department and that of its attorney rather than the advice as to the law and its effect from an Investigator of the Wage & Hour Division of Respondent who had no legal education or training. Yet the Court held that because of this conduct, PETITIONER should be enjoined. Obviously the injunction could not have been issued, unless this Court changes the law and holds that a crew leader is not an F.L.S.A. Independent Contractor.

Injunctions in F.L.S.A. cases are based, not upon past violations as a punishment for the party, but upon a need to require the party to comply with the law because his promise to do so cannot be depended upon for as demonstrated by past acts. *Mitchell v. Hertzke, supra; Buckley v. Wirtz*, 326 F.2d 838 (10th Cir. '69); *Schultz v. Salinas,*

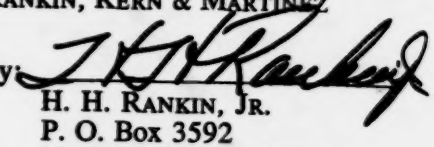
416 F.2d 412 (5th Cir. '69). (A case against a crew leader who the Department of Labor contended was the sole employer of the harvest hands.) Here PETITIONER has done everything short of making the field hands its employees in an attempt to cooperate with the government and see that the F.L.S.A. is complied with. Therefore, the only possible basis for the injunction is punishment.

Also, PETITIONER consulting its attorney about the status of the crew leaders and relied upon his advice, which heretofore has been shown to be well founded, and upon RESPONDENT'S own formal opinions that the crew leaders were F.L.S.A. Independent Contractors. It is well settled that reliance upon an attorney's advice, provided there is a reasonable basis for it, is a valid defense to the issuance of an injunction. *Hodgson v. Parke, dba Southwestern Guard Service,* 413 F.2d 1364 (5th Cir.; '69); *Van Dyke v. Bluefield Gas Co.,* 210 F.2d 620 (4th Cir.; '54); and *Mitchell v. Blanchard,* 272 F.2d 574 (5th Cir.; '59). The fact that the Labor Department is forced to file a suit to resolve the issue does not change the situation or require an injunction, especially if the government is attempting to change the law and their own interpretation of it, *Wirtz v. G & W Packing Co.,* 324 F.2d 802 (4th Cir.; '63), especially since the only way the Labor Department can proceed is by a suit for an injunction. *Mitchell v. Lublin, McGaughy & Assoc.,* 79 Sup. Ct. 160 (Sup. Ct.; '59). Certainly this is true here. Not only is there a valid defense to an injunction, but the only basis there can be for it is to punish PETITIONER for having the audacity to disagree with an investigator of RESPONDENT and insist the question be judicially determined.

PRAYER

For the reasons set forth above, it is respectfully submitted by PETITIONER, GRIFFIN AND BRAND OF McALLEN, INC., that this PETITION for a WRIT OF CERTIORARI should be granted.

RANKIN, KERN & MARTINEZ

By: 

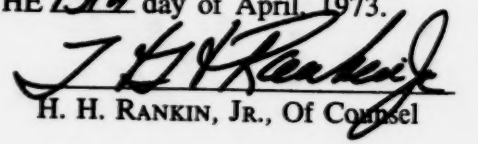
H. H. RANKIN, JR.
P. O. Box 3592
McAllen, Texas 78501
(512) 682-2891

Attorney for Petiitoner

CERTIFICATE OF SERVICE

I, H. H. RANKIN, JR., of Counsel, do hereby certify that I have this day forwarded three (3) copies of the above PETITION for WRIT OF CERTIORARI to the United States Department of Labor, Office of the Solicitor, Carin Ann Clauss, Room 4141, Main Labor Building, 14th and Constitution Avenue, N.W., Washington D.C. 20210 and three (3) copies of the above PETITION for WRIT OF CERTIORARI to the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing the same in the United States Mail, airmail, certified mail, return receipt requested, postage prepaid.

DATED THIS THE 13th day of April, 1973.



H. H. RANKIN, JR., Of Counsel

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2441
Summary Calendar*

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

GRIFFIN AND BRAND OF McALLEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(January 4, 1973)

Before THORNBERRY, COLEMAN and INGRAHAM,
Circuit Judges.

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* Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al,* 5th Cir. 1970, 431 F.2d 409, Part I.

THORNBERRY, Circuit Judge: The Secretary of Labor brought this suit under 29 U.S.C.A. § 217 to enjoin Griffin and Brand of McAllen, Inc. from violating the minimum wage, record keeping, and child labor provisions of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. The district court after trial without a jury found that Griffin and Brand had violated the Act and issued an appropriate injunction. Griffin and Brand appeals and we affirm.

The district court described appellant's method of doing business and relationship to the harvest workers in part as follows:

"Defendant Griffin and Brand of McAllen, Inc. is engaged in the cultivation, harvesting, handling, packaging and marketing of fruit and vegetables in various counties of South Texas, including Hidalgo County. Defendant owns and operates a large fruit and vegetable warehouse and packing establishment in McAllen, Texas, and conducts farming operations. There is no question, and defendant admits, that the farm produce handled by defendant is transported, offered for sale, and shipped in interstate commerce.

"Defendant Griffin and Brand engages in harvesting operations for onions, carrots, tomatoes, peppers and other crops. An efficient harvest naturally necessitates a great amount of manual labor, and the required labor force is drawn in large measure from both resident and migrant Mexican-American farm workers. Griffin and Brand, as do all others similarly engaged, obtains the services of these farm workers by dealing with so-called 'crew leaders.' 'Crew leaders' are aware of various loca-

tions at which these workers congregate or reside, and hence are able to secure them in substantial numbers on short notice. After a 'crew leader' contacts the laborers, he then transports them to the work site. A 'crew leader' usually only furnishes his truck or trucks, and he uses his truck or trucks not only to take the farm hands to the fields and back to their homes, but also uses the same to haul the harvest from the field to the shed.

"Griffin and Brand secures its necessary labor as follows: 'Crew leaders' in search of jobs contact an agent of Griffin and Brand. If there is work available on a certain day, Griffin and Brand's agent will tell the 'crew leaders' when and where the labor is needed. When the 'crew leaders' arrive at the job site with the harvesting crew, an agent of Griffin and Brand will tell each particular 'crew leader' in what area he is to deploy his crew.

"The 'crew leaders' are usually paid by defendant for the labor supplied with a weekly lump sum, often paid in advance. The 'crew leader' himself, not defendant, is responsible for meting out the earnings of the individual laborers. The 'crew leaders' are paid by what is known as a 'piece rate,' which means that they are paid so much per basket picked. The 'piece rate' varies with the size of the particular vegetable or fruit being harvested. The 'crew leader,' who is paid on this unit basis, in turn pays the laborers on a lower . . . basis, keeping the difference for himself.

* * * *

"The evidence shows that Griffin and Brand, at the suggestion of the Government, kept social security records on behalf of the harvest hands employed to harvest crops.

Before the pay check was given to the 'crew leaders,' Griffin and Brand deducted the social security due from it. Forms were provided the 'crew leaders' by Griffin and Brand, on which they were to keep track of the number of baskets picked. The forms were used by defendant's bookkeeper to determine the amount of social security for each worker. This money, which included both the share of the harvest hand and the 'crew leader,' was then deducted and placed in an escrow account. Weekly reports were sent by Griffin and Brand's bookkeeper to an outside bookkeeper, who was retained to do the 'crew leader's' social security computations. This arrangement was found to be necessary, as the average 'crew leader' has little or no formal education and is totally incapable of seeing that social security is paid in behalf of the harvesting crews. At year's end, defendant's bookkeeper, on the basis of the outside bookkeeper's computations, paid the Government that requisite social security monies from the escrow account, paid the outside bookkeeper, and then refunded any remaining balance to the people designated by the bookkeeper as due a refund. The check paying the social security to the Internal Revenue Service was a check drawn on defendant with a separate check for each 'crew leader.' The 'crew leaders' signed the social security return, not the check."

Further, testimony indicated that appellant, through its field supervisors, exercises considerable control over the crew leaders and the harvest workers. Red Martin, the head field supervisor tells the crew leaders at what hour to begin work and assigns them a certain number of rows or patches to harvest each day according to the number of members in the crew. Martin tells the crew leaders the

rate at which they should pay the harvest workers and whether to pay an hourly wage or a piece rate. Martin and other field supervisors oversee the harvest work in the fields each day and give instructions to the crew leaders, who pass them on to the harvest workers.

On these facts the district court concluded appellant Griffin and Brand was an employer, or a joint employer, of the harvest crews within the meaning of the Fair Labor Standards Act, and enjoined it from violating the child labor, minimum wage, and record keeping provisions of the Act in the future. Appellant does not dispute that the violations occurred, but vigorously denies that it is the employer or a joint employer of the harvest crews. Rather, it argues, the crew leaders, as independent contractors, are the sole employers of the crews. In addition, appellant contends the issuance of an injunction was improper even if it is a joint employer of the harvest crews.

A. Employer-Employee Relationship

The independent contractor status of the crew leaders, if they are independent contractors, does not as a matter of law negate the possibility that Griffin and Brand may be a joint Employer of the harvest workers. "There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees," *Rutherford Food Corporation v. McComb,* 331 U.S. 722, 729, 67 S.Ct. 1473, 1476 (1947), but independent contractor status does not necessarily imply the contractor is solely responsible for his employees under the Fair Labor Standards Act. Another employer may be jointly responsible for the contractor's employees. *E.g., Boire v. Greyhound*

Corporation, 376 U.S. 473, 84 S.Ct. 894 (1964);[1] *Mitchell v. Hertzke,* 10th Cir. 1956, 234 F.2d 183; *Fahs v. Tree-Gold Co-op Growers of Florida,* 5th Cir. 1948, 166 F.2d 40.

Whether appellant is an employer of the harvest workers does not depend on technical or "isolated factors but rather on the circumstances of the whole activity." *Rutherford Food Corporation v. McComb, supra,* 331 U.S. at 730, 67 S.Ct. at 1477; it depends not on the form of the relationship but on the "economic reality." *Shultz v. Hinojosa,* 5th Cir. 1970, 432 F.2d 259, 264. This court has summarized the proper approach to be taken and some important factors to be regarded as follows:

> "Whether a person or corporation is an employer or joint employer is essentially a question of fact. . . . In considering whether a person or corporation is an 'employer' or 'joint employer,' the total employment situation should be considered with particular regard to the following questions: (1) Whether or not the employment takes place on the premises of the company?; (2) How much control does the company exert over the employees?; (3) Does the company have the power to fire, hire, or modify the employment condition of the employees?; (4) Do the employees perform a 'specialty job' within the production line?; and (5) May the employee refuse to work for the company or work for others?"

Wirtz v. Lonestar Steel Company, 5th Cir. 1968, 405 F.2d 668, 669. Since the question of appellant's joint employer

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1. "Decisions that define the coverage of the employer-employee relationship under the [National] Labor [Relations] and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." Rutherford Food Corp. v. McComb, 331 U.S. 722, 723, 67 S.Ct. 1473-74 (1947).

status is one of fact, it is subject to review under the "clearly erroneous" standard. *Id.* at 670.

We do not think the district court's conclusion in this case that appellant was a joint employer was clearly erroneous; on the contrary, we find that it was amply supported by the evidence. Of course, the work necessarily took place on appellant's premises. The testimony that appellant's field supervisors supervised the harvest work tends to indicate an employment relationship. The fact that appellant effected the supervision by speaking to the crew leaders, who in turn spoke to the harvest workers, rather than speaking directly to the harvest workers does not negate a degree of apparent on-the-job control over the harvest workers. The fact that appellant set the rate of pay of the harvest workers, decided whether crew leaders would pay a piece rate or an hourly rate in a given instance, and handled the social security contributions for the harvest workers also tend to indicate an employment relationship. Viewing the total work arrangement, we agree with the district court that appellant was a joint employer and thus responsible for the violations of the Fair Labor Standards Act.

B. Propriety of the Injunction

We should vacate the injunction in this case only if we conclude the district court abused its discretion. "Two factors to be considered in determining whether an injunction should issue are the employer's previous actions of non-compliance and the dependability of its promises for future compliance." *Shultz v. Salinas,* 5th Cir. 1969, 416 F.2d 412, 414. Testimony at trial indicated past violations of the Act and disagreement between appellant

and compliance officers of the Department of Labor concerning its obligations under the Act to the harvest workers. Although an issue was created as to whether appellant at all times acted in good faith reliance on advice of counsel, the district court was competent to evaluate the testimony and determine the dependability of appellant's promise of future compliance. We find no abuse of discretion in the issuance of the injunction.

The judgment of the district court is in all respects AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2441
Summary Calendar

D. C. Docket No. CA 70-B-65
JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

GRIFFIN AND BRAND OF McALLEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

January 4, 1973

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2441

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

GRIFFIN AND BRAND OF McALLEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 4, 1973, 5 Cir., 1973, ___ F.2d ___).

(March 9, 1973)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

70-B-65

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

GRIFFIN & BRAND OF McALLEN, INC.,
Defendant

MARCH 31, 1972
MEMORANDUM OPINION

The Secretary of Labor by this suit would have this Court enjoin Defendant, Griffin and Brand of McAllen, Inc., a McAllen, Texas, corporation, from violating the minimum wage, record keeping and child labor provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §201 et seq., hereinafter referred to as the Act. The case was tried to the Court.

Defendant Griffin and Brand of McAllen, Inc. is engaged in the cultivation, harvesting, handling, packaging and marketing of fruit and vegetables in various counties of South Texas, including Hidalgo County. Defendant owns and operates a large fruit and vegetable warehouse and packing establishment in McAllen, Texas, and conducts farming operations. There is no question, and Defendant admits, that the farm produce handled by Defendant is transported, offered for sale, and shipped in interstate commerce.

Defendant Griffin and Brand engages in harvesting operations for onions, carrots, tomatoes, peppers and other crops. An efficient harvest naturally necessitates a great amount of manual labor, and the required labor force is drawn in large measure from both resident and migrant Mexican-American farm workers. Griffin and Brand, as do all others similarly engaged, obtains the services of these farm workers by dealing with so-called "crew leaders". "Crew leaders" are persons who specialize in acquiring and transporting to work areas large numbers of farm laborers. The "crew leaders" are aware of various locations at which these workers congregate or reside, and hence are able to secure them in substantial numbers on short notice. After a "crew leader" contacts the laborers, he then transports them to the work site. A "crew leader" usually only furnishes his truck or trucks, and he uses his truck or trucks not only to take the farm hands to the fields and back to their homes, but also uses the same to haul the harvest from the field to the shed.

Griffin and Brand secures its necessary labor as follows: "Crew leaders" in search of jobs contact an agent of Griffin and Brand. If there is work available on a certain day, Griffin and Brand's agent will tell the "crew leaders" when and where the labor is needed. When the "crew leaders" arrive at the job site with the harvesting crew, an agent of Griffin and Brand will tell each particular "crew leader" in what area he is to deploy his crew.

The "crew leaders" are usually paid by Defendant for the labor supplied with a weekly lump sum, often paid in advance. The "crew leader" himself, not Defendant, is responsible for meting out the earnings of the individual laborers. The "crew leaders" are paid by what is known as a "piece rate", which means that they are paid so much

per basket picked. The "piece rate" varies with the size of the particular vegetable or fruit being harvested. The "crew leader", who is paid on this unit basis, in turn pays the laborers on a lower unit basis, keeping the difference for himself.

It is the Secretary's contention in this case that the vegetable harvesting crews involved were Defendant's employees within the meaning of the Act, and that since these laborers were not receiving the minimum wage, that Defendant is therefore in violation of the terms of the Act.

Defendant, of course, contends that the harvesting crews are not its employees, but those of the "crew leaders", and that the "crew leaders" themselves are "independent contractors" and not the employees of Defendant.

This Court finds it unnecessary to decide whether the "crew leaders" are "independent contractors" or "employees" of Defendant, for in the situation here presented, the result will be the same under the Act. This may be readily determined in light of the Supreme Court's pronouncement that "where the work done, in essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act". *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The Fifth Circuit has held that where the operator of a steel mill utilized independent contractors to haul ore from mine to ore plant, and the operator knew, or should have known, that the contractors violated the minimum wage provisions of the Act, that the operator was in violation of the "hot goods" provision of the Act. 29 U.S.C. 215(a)(1). *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (CA 5 1968). It is clear from the evidence presented at the trial of this case that the harvest-

ing crews engaged in harvesting crops for Griffin and Brand were paid less than the minimum wage, and that Griffin and Brand knew, or should have known, of such violations of the Act.

The period involved in this action was subsequent to February 1, 1969, therefore the minimum wage at which Defendant was required to pay its field employees was not less than $1.30 per hour. Arnoldo E. Garza, a representative of the Texas Department of Agriculture, testified as to a study made by the Texas Department of Agriculture to determine the productivity of harvesters of agricultural commodities, including the harvest of onions and carrots in the Rio Grande Valley during the years 1969 and 1970. Garza participated in timing groups of workers and calculating the number of baskets the average worker was able to pick per hour. The survey showed that the average worker picked 4.45 baskets per hour when harvesting onions. Since the average piece rate for the harvest hands was 23 to 25 cents per basket, it may be easily seen that the average laborer, even at 25 cents per basket earned around $1.11 per hour. For carrots, the average piece rate was from 14 to 15 cents per basket. According to the survey, a worker could pick 7.65 baskets per hour. At a rate of 15 cents per basket, the average worker would earn around $1.15 per hour. The evidence shows that Griffin and Brand kept no records of the number of hours worked by laborers on a piece rate basis, nor did their "crew leaders".

The testimony of a U. S. Department of Labor Compliance Officer revealed that the production figures from the Texas Department of Agriculture survey were applied to Griffin and Brand's operations to determine the average hourly wages of the harvest hands working in Griffin and

Brand fields. It was determined that in numerous specific instances, laborers were underpaid in small amounts, which varied from $1.00 to $8.00 per week.

The evidence shows that Griffin and Brand, at the suggestion of the Government, kept social security records on behalf of the harvest hands employed to harvest crops. Before the pay check was given to the "crew leaders", Griffin and Brand deducted the social security due from it. Forms were provided the "crew leaders" by Griffin and Brand, on which they were to keep track of the number of baskets picked. The forms were used by Defendant's bookkeeper to determine the amount of social security for each worker. This money, which included both the share of the harvest hand and the "crew leader", was then deducted and placed in an escrow account. Weekly reports were sent by Griffin and Brand's bookkeeper to an outside bookkeeper, who was retained to do the "crew leader's" social security computations. This arrangement was found to be necessary, as the average "crew leader" has little or no formal education and is totally incapable of seeing that social security is paid in behalf of the harvesting crews. At year's end, Defendant's bookkeeper, on the basis of the outside bookkeeper's computations, paid the Government that requisite social security monies from the escrow account, paid the outside bookkeeper, and then refunded any remaining balance to the people designated by the bookkeeper as due a refund. The check paying the social security to the Internal Revenue Service was a check drawn on Defendant, with a separate check for each "crew leader". The "crew leaders" signed the social security return, not the check.

It is clear that not only did Griffin and Brand have the "contractual right to inspect the records of the con-

tractors at any time", *Wirtz v. Lone Star Steel, supra,* p. 670, but its relations with the harvest hands were such as to put it in the position to know or discover the wages paid to each "crew member". The Fifth Circuit Court of Appeals has held the following language applicable to Fair Labor Standards Act cases: "The statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service." *Shultz v. Hinojosa,* 432 F.2d 259, 264 (CA 5, 1970), quoting *Fahs v. Treegold Co-Op Growers of Florida,* 166 F.2d 40, 44 (CA 5, 1948). In this case, as a matter of economic reality, the laborers involved must depend upon Defendant to see that they receive the minimum wage.

As far as Defendant in this case is concerned, " 'good faith' under the Act does not include ignoring the obvious . . . A good faith effort to comply with the Act would have included checking their records and any further investigation necessary to ascertain the facts". *Wirtz v. Lone Star Steel, supra,* p. 670. A person or corporation may not take an "ostrich-like attitude" and still be in good faith under the Act. *Mitchell v. Hausman,* 261 F.2d 778 (CA 5, 1958). This Court therefore finds that Griffin and Brand was in violation of the "hot goods" section of the Act, in that it knew, or should have known, or the failure of the harvesting crews to attain the minimum wage as the Act mandates. 29 U.S.C. 215(a)(1). *Wirtz v. Lone Star Steel, supra.*

The Secretary herein proceeds against Griffin and Brand for alleged violations of the Child Labor provisions of the Act, 29 U.S.C.A. Sections 212, 215(a)(4), and 203(1). At trial, it was proven that some nine minors were dis-

covered working on Defendant's farms during April of 1970. Defendant, of course, urges that any such violations were "de minimus". This Court does not consider the nine violations here proven to be "de minimus"; on the contrary, Griffin and Brand, through their "crew leaders", has violated the Child Labor provisions of the Act.

Defendant vigorously disputes the propriety of an injunction in this case. This Court must take note that the Court of Appeals for the Fifth Circuit "has not been timid in requiring injunctive decrees in Fair Labor Standards Act cases, nor of candid confession minimizing the likelihood of future violation". *Gulf King Shrimp Company v. Wirtz*, 407 F.2d 508 (CA 5, 1969). Injunctions in cases involving child labor are proper, even when all violations of the law have ceased at the time of suit. *Gulf King Shrimp Co., supra.* Griffin and Brand will be enjoined from any further violations of the child labor provisions of the Act.

In sum, Defendant herein may not use the so-called "independent contractor" status of its "crew leaders" as a buffer to shield it from responsibility under the Fair Labor Standards Act, when it utilizes the labor and services of harvest hands supplied by the "crew leaders". Griffin and Brand knew, or should have known, that these laborers were being paid less than the minimum wage, and that the "crew leaders" were violating the child labor provisions of the Act, and no record of hours worked was being kept. The harvesting crews are an integral and necessary part of the production of the goods for commerce that Griffin and Brand sell, and since the test of a workman's status as employee or independent contractor for Fair Labor Standards Act purposes is in terms of economic reality rather than in technical concepts, it

makes little difference whether the harvesting crews are working for an independent contractor or Griffin and Brand. Griffin and Brand and the so-called "crew leaders" are joint employers of these harvesting hands for purposes of the Fair Labor Standards Act. *Mitchell v. John R. Crowley & Bro., Inc., et al,* 292 F.2d 105 (CA 5, 1961); *Hodgson v. Okada,* 326 F. Supp. 514 (DC Colo. 1971).

Under the facts of this case, Griffin and Brand and all others similarly engaged and using the same system for employing harvesting crews must be responsible for seeing that the harvesting crews come under the protection of the Fair Labor Standards Act.

The Secretary of Labor is therefore entitled to an injunction against Griffin and Brand, prohibiting further violations of the minimum wage, record keeping and child labor provisions of the Act. Griffin and Brand must require its "crew leaders" to keep records of hours worked by the harvest hands, see to it that the minimum wage requirement of the Act are complied with, and be responsible to see that no child labor is employed in violation of the Act.

Counsel for the Secretary of Labor will prepare an appropriate decree for entry.

The Clerk will send copies of this Memorandum, which includes the Findings of Fact and Conclusions of Law of the Court, to counsel for the parties.

Done at Brownsville, Texas, this 31st day of March, 1972.

/s/ REYNALDO G. GARZA
REYNALDO G. GARZA
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

70-B-65

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

GRIFFIN & BRAND OF McALLEN, INC.,
Defendant

APRIL 20, 1972
JUDGMENT

This cause came on for trial without a jury, the parties being represented by their respective attorneys, and the Court after hearing the testimony of witnesses sworn and examined in open court and other evidence offered and received, and on the 31st day of March, 1972, having entered Findings of Fact and Conclusions of Law, now, pursuant thereto, it is

Ordered, adjudged and decreed that the Defendant, Griffin and Brand of McAllen, Inc., its officers, agents, servants, employees, and all persons in active concert or participation with them be, and they are hereby, permanently enjoined and restrained from violating the provisions of Sections 15(a)(2), 15(a)(4), and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq., hereinafter referred to as the Act, in any of the following manners:

(A) Defendant shall not compensate its employees engaged in commerce and in the production of goods for

commerce at rates less than $1.30 an hour, contrary to Section 6 of the Act, or at rates less than those provided by any amendment to the Act.

(B) Defendant shall not employ any oppressive child labor in commerce and in the production of goods for commerce, contrary to Section 12(c) of the Act.

(C) Defendant shall not fail to make, keep, and preserve records of employees engaged in commerce and in the production of goods for commerce, contrary to Section 11(c) of the Act and applicable regulations found in 29 CFR part 516.

It is further ordered that the Defendant require its "crew-leaders" to keep records of the hours worked by members of their respective crews, to comply with the minimum wage provisions of the Act and to not employ child labor in violation of the Act, and it is further

Ordered that the costs of the action be, and the same are hereby, taxed against the Defendant.

Dated this 20th day of April, 1972.

/s/ REYNALDO G. GARZA
United States District Judge

STATUTORY PROVISIONS AND DEPARTMENTAL INTERPRETATION

The pertinent provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. 203 et seq., are as follows:

Sec. 203(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . .

Sec. 203(e) "Employee" includes an individual employed by an employer. . .

* * *

Sec. 203(g) "Employ" includes to suffer or permit to work.

* * *

Sec. 203(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer * * * in any occupation.

* * *

Sec. 206(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(5) if such employee is employed in agriculture, not less than * * * $1.30 an hour * * *

* * *

Sec. 211(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

* * *

Sec. 212(a) No producer * * * shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed * * *.

* * *

Sec. 212(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

* * *

Sec. 213(a) The provisions of sections 206 . . . shall not apply with respect to—

(6) any employee employed in agriculture (a) if such employee is employed by any employer

who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days or agricultural labor * * *.

* * *

Sec. 213(c)(1) * * * the provisions of section 212 of this title relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed.

* * *

Sec. 215(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 * * *; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 * * *;

* * *

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title.

* * *

Sec. 217 The district courts * * * shall have jurisdiction, for cause shown to restrain violations of section 215, including in the cases of violations of section 215(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act * * *.

The pertinent interpretation of the Wage and Hour Division of the Department of Labor, Opinion Letters Number 640 and 658, are as follows:

U. S. Department of Labor
Wage and Hour and Public Contracts Division
Office of the Administrator
Washington, D. C. 20210

July 19, 1967
21 AB 402.2
BC 102.11

This will reply to your letter of June 7, 1967, regarding farm labor contractors under the Fair Labor Standards Act.

The labor contractors about whom you inquire, who are also known as crew leaders, supply farmers with seasonal agricultural workers. These contractors own their own busses or trucks and perform the following activities: they deliver the workers to the farm, see that the workers are supplied with water and lunches, give some supervision to the work operation, receive the pay from the farmer and in turn pay the workers, and then return the workers to their homes at the end of the day. Contractors may contract with as many as five different farmers during a given week.

While detailed facts as to the manner of operation are not available in the information you have furnished, it appears unlikely that these crew leaders are independent contractors for purposes of the act. To be considered as the employer of the workers, a crew leader must, in addition to transporting the workers and serving as head of the group, give more than nominal supervision to the work operation and receive the pay from the farmer. In an independent contractor relationship, for example, a farmer may set out the general manner of performance

and the steps required for coordinating with the other farm operations, but the crew leader makes the day to day decision regarding the work. In such a relationship he has the authority to hire and fire the workers and direct the labor force while working in the field. Complaints by the farmer about the quality or quantity of the work or about a worker are made to the contractor or his representative, who takes whatever action is deemed appropriate.

An essential ingredient in an independent contractor's status, also, is the crew leader's opportunity for profit or loss through his supervision of the crew and its output. On the basis of general information available to us it appears that in a typical independent contractor relationship the farmer pays the contractor an agreed price per acre, row, pound, bushel, man-hour of labor, or other unit, and the contractor pays the workers at rates determined by him. Opportunity for profit or loss results through his control over the time and manner of performance of work by his crew and his authority to determine the wage rates paid to the workers.

If the labor contractor in your example exercised supervision of the crew and had opportunity for profit or loss as indicated above, he would in our opinion be an independent contractor for purposes of the act. In such a case, the crew members would be considered his employees, and compliance with the act's provisions would be considered his responsibility and not that of the farmer. The crew's man-days of labor would not be counted in determining the farmer's status under the 500 man-day test.

Sincerely yours,

/s/ Clarence Z. Lundquist
Administrator

U. S. Department of Labor
Wage and Hour and Public Contracts Division
Washington, D. C. 20210

August 2, 1967
21 AB 402.2
BC 102.14

This is in further reference to your letter of March 22, 1967, concerning the application of the Fair Labor Standards Act to farm workers furnished by crew leaders or labor contractors.

You state that you grow a large crop of vegetables each year both for market as well as for processing. At harvest time you utilize about eighty migrant workers. You make a verbal contract with their leader who is to furnish the workers, supervise the harvesting operation, and haul the vegetables on his trucks to your packing house and factory for a specified amount per unit. You have no contact with the migrant workers. The leader maintains his own records, prepares his own payroll, and pays the workers. In addition, the leader has a large investment in busses and trucks which are used in the harvesting work and for transportation purposes.

On the basis of this information contained in your letter, it appears that the leader of the migrant workers is an independent contractor for purposes of the act. In this connection, you may be interested in a recent opinion letter dated July 19, 1967.

Sincerely yours,

/s/ Frederick J. Glasgow
Special Assistant to the
Administrator

cc: Honorable Rogers C. B. Morton
Enclosure—July 19, 1967 Opinion Letter

MAY 31 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1395

GRIFFIN & BRAND OF McALLEN, INC.,
Petitioner,

versus

PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF
OF
TEXAS CITRUS AND VEGETABLE GROWERS
AND SHIPPERS

R. Glenn Jarvis
Scott Toothaker
Attorneys for Petitioner

Of Counsel
EWERS, TOOTHAKER, EWERS, ABBOTT,
TALBOT, HAMILTON & JARVIS
Post Office Box 3670
McAllen, Texas 78501

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-1395

GRIFFIN & BRAND OF McALLEN, INC.,
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PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF
OF
TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS

TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS, with the consent of the parties filed herewith, files this Brief as *Amicus Curiae* in support of PETITIONER'S Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on January 4, 1973.

INTEREST OF AMICUS CURIAE

TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS, (hereafter called "ASSOCIATION"), is a nonprofit association whose members are growers and shippers of perishable fruits and vegetables in the State of Texas. Its members are engaged in the planting, growing, packing and preparing for shipment and shipping of citrus fruits, such as grapefruit, oranges, lemons and tangerines, and various varieties of fresh vegetables, such as onions, lettuce, peppers, potatoes, carrots and tomatoes. The ASSOCIATION'S membership represents ninety percent (90%) of the perishable fresh fruits and vegetables shipped from the State of Texas. The main office of the ASSOCIATION is in Harlingen, Texas.

The questions presented in the Petition involve the employment status, under the Fair Labor Standards Act, 29 U.S.C.A. §201, *et seq.*, (hereafter called "Act"), of harvesting employees of labor contractors, (referred to sometimes below as "crew leaders", who, through contract, provide harvesting and preharvesting services to a grower and/or shipper of farm produce), in relation to their employer, (the labor contractor), and the grower and/or shipper.[1] The Courts below held in the instant case that the labor contractor and grower and shipper were "joint employers", or,

---

[1]The term "grower and/or shipper" refers to two basic situations: (1) where the grower (farmer) is the owner of the produce harvested and also the shipper of the produce; (2) where the grower is a separate person from the shipper, but his produce is under contract for delivery to a shipper.

stated another way — were both employers of the harvesting employees. The effect of these holdings makes the grower and/or shipper, as the case may be, responsible for any violations of the Act by the labor contractor vis-a-vis his employees and, as a practical matter, an enforcer of the Act by virtue of the application of the hot goods provisions.

The very nature of the growing of perishable fruits and vegetables and of their harvest due to their perishability, which require harvest during critical and sometimes very brief periods, coupled with the difficulty of procuring sufficient pre-harvesting and harvesting workers needed at critical times, have required the ASSOCIATION'S members to contract with labor contractors to furnish this vitally needed labor service. The use of labor contractors among growers and/or shippers is a practice not only in Texas, but also in other similar agricultural producing areas of the nation.

As stated by the District Court below in its Memorandum Opinion:

> ". . . (Petitioner) and all others similarly engaged in using the same system for employing harvesting crews must be responsible for seeiing that the harvesting crews come under the protection of the Fair Labor Standards Act."

Moreover, since the decision in the Courts below, representatives of RESPONDENT have noted in the press that these Court holdings have wide application in the agricultural industry.

The ASSOCIATION'S membership has a vital interest in the ultimate outcome of this case, as do all those similarly engaged in the agricultural industry in this country, as well as the housewives, who ultimately buy our nation's supply of fresh fruits and vegetables.

REASONS FOR GRANTING THE WRIT

The Court below, in holding that the grower and shipper and labor contractor are joint employers of the harvesting employees of the labor contractor, has imposed a "joint employer" concept in agricultural employment relations, which is contrary to Congressional intent, as reflected by legislative history of the 1966 Amendments to the Act, (when the agricultural industry was first brought under the minimum wage provisions of the Act), and contrary to the principles announced in applicable decisions of this Court.

The fresh fruit and vegetable portion of the agricultural industry is a complicated industry fraught with problems, including labor supply problems, due to the inherent nature of this type of produce. The employment relationship under the Act between employees of a labor contractor and the growers and/or shippers with whom he contracts is very important to the agricultural industry. The effect of the holdings below imposes not only financial and supervisory responsibility upon the grower and/or shipper for any violations of the Act by a labor contractor vis-a-vis his employees, but also by virtue of the hot goods holding, an enforcement responsibility, which is not a duty of

the private sector, but of the Government itself. The questions presented in this case are important federal questions dealing with an important industry in our country, which have not been considered by this Court. Because of the significant future effect of these holdings upon the agricultural industry, review by this Court is vitally needed.

Brief Background of Agricultural Employment Problems

In the past several years, agricultural employees have received nationwide attention. Their problems, as well as those of growers and/or shippers, have been debated in Congress, in the press and elsewhere, and the relative positions of each elucidated more so than ever before.

That part of the agricultural industry engaged in the production and distribution of fresh fruits and vegetables is engaged in a highly complicated industry. This is mainly due to the essence of its produce — that is, *fresh* fruits and vegetables. The growing of these products is dependent upon weather, pests and other conditions, which the talents of man have been unable to control to any degree of success. Planting and other pre-harvesting operations must be accomplished at particular times, despite growing conditions, or economic loss is suffered. Once the produce is ready for harvest and market, due to its perishability, it is critical that it be harvested and shipped during short periods of time or seasons, and as rapidly as possible.

It is a "hurry up and wait" industry, for, between these periods of extreme activity, the grower must wait and pray the produce flourishes under conditions offered by nature. As to agricultural employees, this means highly seasonal work. Growers and shippers cannot offer year-round employment for the maximum number of field employees that may be needed during the year. Because of this, growers and/or shippers have faced critical labor supply problems. This is especially true for harvesting operations where large numbers of employees are needed for short periods of time. In the South Texas area, this has been more critical because of the migrant problem, but offset to a limited degree by the availability of labor due to its geographical proximity to Mexico.

In years past, the harvesting of farm products and most pre-harvesting operations were mainly by hand labor; however, due to the unavailability of a sufficient labor supply and increased labor costs, it has been necessary for the agricultural producer to utilize mechanization as much as possible. The use of machines has been successful as to some agricultural products, but not as much so in fresh fruits and vegetables. Though there are available limited harvesting machinery in the fresh fruits and vegetables fields, no means have yet been developed to efficiently and adequately harvest most of these products other than by hand labor.

Because of the unavailability of adequate mechanization, the producers of fresh fruits and vegetables have had to seek solutions to their harvesting, as well

as other pre-harvesting needs for field labor, (such as chopping and weeding), through the use of labor contractors, who have the ability to amass workers in sufficient numbers to render this labor service. Labor contractors also provide the required number of vehicles for transportation of produce to the packing sheds and to transport his employees to the fields. This equipment is not otherwise needed by the average grower or shipper for his operations, and would represent a large investment difficult to recapture.

The general scheme of this arrangement is that the grower and/or shipper involved will arrange with a labor contractor to provide the necessary field labor and equipment. In the harvesting operations, the grower and/or shipper will, by necessity, indicate to the labor contractor the times of harvest, location of the crop to be harvested and delivery point. This same scheme is used to a lesser degree in other pre-harvesting field operations.

Because of the sporadic need of such labor service among most individual growers and/or shippers, there is a large turnover. During any one week, one labor contractor may serve several different growers and/or shippers, and, further, general experience is that the individual labor contractor has a large turnover within his employees; that is, an agricultural employee may work for different labor contractors within a single week, depending upon the harvest work generated by the labor contractor through his grower and/or shipper contacts. The circumstances create significant employment record keeping problems over which the

labor contractor is more closely connected than the grower and/or shipper who is, at the time, involved in the effort of getting the perishable fruits or vegetables to market.

The labor contractor system has been the only solution available to the grower and/or shipper, large or small, faced with these difficult labor problems. The labor contractor's business is to have available to him sources of labor supply and equipment to offer this service. His arrangements with the grower and/or shipper may vary in details in individual cases. The facts in the instant case show the arrangement in a case involving a large shipper and grower. As the harvesting season terminates in one agricultural area and begins in another, the labor contractor transports his labor supply to a new area, many times to another state, for similar activities.

1966 Amendments to the Fair Labor Standards Act

The 1966 Amendments to the Act extended the Act's minimum wage provisions to agricultural employees for the first time, and, incidental thereto, the hot goods provisions of §15 of the Act. The child labor provisions relating to agriculture were also amended.

As noted in the evidence in the lower courts in the instant case, these labor contractors have been considered in the industry as independent contractors responsible for seeing that the minimum wage is paid to their agricultural employees and that no underage minors are allowed to work.

Prior to the 1966 Amendments, when the Act's only contact with agricultural employees was the child labor provisions, there was little Appellate Court activity involving the issues of the instant case. The only close case is *Mitchell v. A. R. Hertzke, et al.*, 234 F.2d 183 (10th Cir. 1956), where the Court held the shipper was not an employer, but the grower was. During this period though the shipper and/or grower were not employers if the labor contractor were an independent contractor, they could be in violation of the hot goods provision of the Act (§12(a)) if they had notice the labor contractor was employing oppressive child labor as defined by the Act at that time, (under 16 years old and working during school hours).

However, with the advent of the 1966 Amendments to the Act, with minimum wage and record keeping coverage, the shipper and/or grower became more exposed as to the labor contractor's employees. Congress was aware of this problem and considered this in their deliberations regarding these Amendments.

Congressional Intent — 1966 Agricultural Amendments

In Senate Report No. 1487 relating to the 1966 Amendments, there is reference to the Amendments pertaining to agricultural workers and this labor contractor situation as follows:

> "During the consideration of agricultural labor coverage, the committee discussed the issue of who is an employee of the farmer and how to determine whether a person is an in-

> dependent contractor. Section 3 of the Act defines the term 'employ,' 'employee,' and 'employer.' It is also clear that if a person is an independent contractor and not an employee of the agricultural employer, neither the independent contractor nor his employees would be employees of such employer." *U.S. Code Cong. & Adm. News*, 89th Cong. 2nd Sess. 1966, Vol. I, page 3012.

The full text of this portion of the Senate Report is set out in Appendix A appended to this Brief. The Senate Report refers to, and it is clear, Congress intended that the principles of *Rutherford Food Corporation v. McComb*, 331 U.S. 722 (1947), were to be used in these situations to determine whether the labor contractor was an independent contractor. The Report refers to six (6) factors mentioned in the *Rutherford* case for consideration in determining the independent contractor status. If an independent contractor, then the grower and/or shipper would not be held an employer of the agricultural employees.

After the passage of the 1966 Amendments, advice was sought from the Wage and Hour Administration regarding the status of these labor contractors. The Administrator issued two opinions in July and August of 1967 relative to this question, which are set out in the Appendix to the PETITIONER'S Petition on pages 50 through 52. In both of these opinions, it is clear that the Administrator was following Congress's intent in applying the principles of the *Rutherford* case on independent contractors and found on the facts pre-

sented in the request for opinion letters that the labor contractors, (crew leaders), were independent contractors for purposes of the Act. No reference was made to a "joint employer" concept.

Thus, upon passage of the 1966 Amendments, as reflected by the Congressional intent, an agricultural employee of a labor contractor was not an "employee" of the grower and/or shipper for purposes of the Act, if the labor contractor were an independent contractor under the principles of the *Rutherford* case. This concept was bolstered by the Administration Opinions of the Wage and Hour Department of the Department of Labor and not inconsistent with other existing decisions of this Court in this general area,[2] and of lower courts.[3]

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[2] *U.S. v. Silk, et al., Harrison v. Greyvan Lines, Inc.*, 331 U.S. 704, 67 S.Ct. 1463 (1947); the case of *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 490 (1964), cited often below, did not contain holding on these issues, but only references to the NLRB's joint employment findings, because the Court was concerned with the issue of reviewable of NLRB orders under the *Leedom v. Kyne* doctrine; also *Goldberg v. Whitaker House Corp., Inc.*, 366 U.S. 28, 81 S.Ct. 933 (1961), has been cited below; however, it involved an "employee" situation where a third party contractor was not present.

[3] *E.g., Fahs v. Tree-Gold Co-op Growers of Florida*, 166 F.2d 40 (5th Cir. 1948), was decided on independent contractor basis; its facts are distinguishable from instant case, *e.g.*, contractors were an integral part of processing operation working on the shed as opposed to separate harvesting operation and away from shipper's operations; no investment by contractors; no exercise of judgment, and more control was exercised by the processor, since the work was done on the processor's shed. However, the important aspect of case was that it was decided on independent contractor basis and followed criterion set out in *Rutherford* case, *supra*, referred to in the Senate Report, *supra*. See, also, trucker cases, *Wirtz v. Kneece*, 249 F.Supp. 564 (D.S.C. 1966); *Wirtz v. Manchester Sand, Gravel & Cement Co.*, 236 F.Supp. 885 (D.N.H. 1964); *Goldberg v. Warren Bros. Roads Co.*, 207 F. Supp. 99 (S.D.Me. 1962).

That these cases would be decided on an independent basis, as intended by Congress, was not only reaffirmed by such treatment by the Administrator in his opinions mentioned above, but through actual enforcement activities, as indicated by *Schultz v. Salinas*, 416 F.2d 421 (5th Cir. 1969), in which the Department of Labor sought enforcement against the labor contractor himself, and not the grower and/or shipper, with whom he was contracting.

In the face of this clear Congressional intent and consistent authority, the Courts below in the instant case held, for the first time, the grower and shipper and the labor contractor to be "joint employers", not reaching the independent contractor issue, though implicitly holding that the labor contractor was an independent contractor by virtue of the Court's holding him to be an "employer". In holding the PETITIONER shipper and grower to be a joint employer with the labor contractor, it makes the labor contractor's employees "employees" of the PETITIONER, even though, implicitly, the labor contractor was held to be an independent contractor by virtue of the Court's joint employer holding. This holding directly offends expressed Congressional intent.

Because the lower court's holding is in variance with Congressional intent and the principles of the *Rutherford* case, *supra*, in not deciding the case on an independent contractor basis, but deciding it on a basis so as to circumvent this issue, this Court should review this case and correct this error, and give some guidance to this part of the agricultural industry as

to its responsibilities under the Act vis-a-vis the labor contractor's employees. The Court has not heretofore considered this question, and correction and clarification are clearly needed. This need is further emphasized by a similar recent decision in *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973), decided on similar principles as the instant case.

Hot Goods Provisions

The questions in this case do not involve the social aspect of providing protection to employees through coverage by the Act — a point apparently missed in many of the lower courts' decisions — there is no question that the employees *are* protected by the Act. The questions here involve responsibility by others for violations of the Act by labor contractors. Clearly, a denial of the protection of the Act accorded agricultural employees can be remedied by direct action against the labor contractor himself, who is the one in violation of the Act.

The ASSOCIATION encourages the protection accorded agricultural employees by the Act and does not here imply that it condones knowledgeable allowance of violations of the Act, or "ostrich-like attitudes" by those engaged in the industry. However, under the holdings in the instant case and the *Okada* case, *supra*, and, further, by the fairly recent case of *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968), which involved the violation of the hot goods provisions by a steel mill operator dealing with an independent hauling contractor, the ASSOCIATION'S members are placed in a dilemma.

In the *Lone Star* decision, *supra,* the steel mill operator was held in violation of the hot goods provisions, because he *could or should have known* of violations by the independent contractor haulers. The Court below in the instant case follows this rationale.

If this decision stands, the grower and/or shipper is placed in a dilemma certainly not intended by Congress. The criterion set out in the *Rutherford* case revolves around control. Due to the nature of the agricultural business, as discussed above, the grower and/or shipper has practical difficulties maintaining any type of records on the labor contractor's employees, and to exercise the control indicated by these court of appeals cases requires undue interference in the labor contractor's affairs during the critical and hectic period of harvest and unnecessary increased supervision costs, which directly affect the cost of the foodstuff being produced.

The hot goods provisions of the Act relating to both child labor and minimum wages, (§§12(a) and 15(a)(1)) provide that no violation occurs if a grower and/or shipper does not have knowledge or written assurance and notice of minimum wage or child labor violations. These statutory provisions are clear; however, the courts below have gone beyond the statute's tests by applying the broader test of ". . . could or should have known . . .". This is error.

An employer in the chain of commerce must have notice of violations, then action is dictated to alleviate the violations. This is especially critical in this indus-

try where perishable fruits and vegetables are involved. A delay in marketing is a loss of the produce.

However, under the RESPONDENT'S theory below, and now with lower court sanction, under the circumstances of the industry, the shipper and/or grower becomes an actual enforcer of the Act. To abide by these decisions, the shipper, and/or grower must make investigations, as does the Wage and Hour Division, to seek out violations, rather than take steps to correct them, once discovered.

It is submitted that this was not the intention of Congress in covering agricultural employees by the Act's provisions. This Court has not considered these provisions of the Act as it relates to these agricultural situations, and it is requested to do so for the guidance of the agricultural industry.

CONCLUSION

For the reasons above, it is respectfully requested that the Court grant the Petition of GRIFFIN AND BRAND OF McALLEN, INC., and review the judgment and decision of the Court of Appeals in this case.

Respectfully submitted,

EWERS, TOOTHAKER,
EWERS, ABBOTT, TALBOT,
HAMILTON & JARVIS
Post Office Box 3670
McAllen, Texas 78501

R. Glenn Jarvis
Scott Toothaker

CERTIFICATE OF SERVICE

I, R. GLENN JARVIS, do hereby certify that I have this day forwarded for service three (3) copies of the above *Amicus Curiae* Brief to the Solicitor General, Department of Justice, Washington, D.C., 20530, counsel for Respondent, by depositing same in the United States mail, with first class postage prepaid, airmail, and three (3) copies of same to H. H. Rankin, Jr., counsel for Griffin and Brand of McAllen, Inc., Petitioner, by depositing same in the United States mail with first class postage prepaid.

DATED this, the __ day of May, A.D., 1973.

R. Glenn Jarvis

APPENDIX A

EXCERPTS FROM SENATE REPORT NO. 1487

"An amendment was adopted by the committee to remove the exemption in the House bill of approximately 30,000 agricultural workers whose wage rates are set by the Secretary of Agriculture under section 301(c)(1) of the Sugar Act of 1948. In adopting this amendment, the committee understands that the Secretary of Agriculture would still establish the wage rate of such worker subject to such worker's receiving no less than the applicable minimum wage established by the Fair Labor Standards Act. The committee sees no reason why these agricultural workers should receive less than the minimum wage.

During the consideration of agricultural labor coverage, the committee discussed the issue of who is an employee of the farmer and how to determine whether a person is an independent contractor. Section 3 of the act defines the terms employ, employee, and employer. It is also clear that if a person is an independent contractor and not an employee of the agricultural employer, neither the independent contractor nor his employees would be employees of such employer. Nor could the man-days worked of such employees be counted toward such agricultural employer. However, such independent contractor may well qualify as an agricultural employer and be subject to the coverage of the act unless otherwise exempted. This same issue was raised during the House debate with regard to the status of certain sharecroppers and tenant farmers. The same tests apply as stated in the House report.

The Supreme Court (in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (67 S.Ct. 1473, 91 L.Ed. 1772, 1947) has made it clear that there is no single rule or test for determining whether an individual is an employee or an independent contractor, but that the "total situation controls." In general an employee, as distinguished from a person who is engaged in a business of his own, is one who "follows the usual path of an employee" and is dependent on the business which he serves. As an aid in assessing the total situation, the Court mentioned some of the characteristics of the two classifications which should be considered. Among those are —

(1) The extent to which the services rendered are an integral part of the principal's business;

(2) The permanency of the relationship;

(3) The opportunities for profit or loss:

(4) The initiative, judgment, or foresight exercised by the one who performs the services;

(5) The amount of investments; and

(6) The degree of control which the principal has in the situation.

The committee fully subscribes to these criteria and to the principle that the total situation in a given case, not just a particular criterion, must be considered in determining whether an individual is an employee or an independent contractor."

U.S. Code Cong. & Adm. News, 89th Cong. 2nd Sess. 1966, Vol. I, pages 3012-3013.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1395

GRIFFIN & BRAND OF MCALLEN, INC., PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25–32) is reported at 471 F.2d 235. The opinion of the district court (Pet. App. 36–43) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33–34) was entered on January 4, 1973. A timely petition for rehearing *en banc* was denied on March 9, 1973 (Pet. App. 35). The petition for a writ of certiorari was filed on April 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

504-963—73——1

QUESTIONS PRESENTED

1. Whether petitioner is responsible under the Fair Labor Standards Act as an "employer" for the wages, hours and other working conditions of harvest hands who, although assembled and hired by others to work on petitioner's farms, are dependent upon petitioner as a matter of economic reality and perform services which are a necessary and integral part of its farming operations.

2. Whether the district court abused its discretion in granting injunctive relief against petitioner in the circumstances of this case.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth in the petition for a writ of certiorari (Pet. App. 46–49).

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C 217) to enjoin petitioner from continuing to violate the Act's minimum wage, record keeping, child labor and shipping provisions with respect to migrant workers who work on the fruit and vegetable crops produced by petitioner for sale and shipment in interstate commerce.

Petitioner denied all responsibility for the violations, claiming that the harvest hands were employed, not by it, but by the crew leaders who assembled and transported them to and from petitioner's farms in the Rio Grande Valley. It further argued that injunc-

tive relief would be inappropriate in view of its good faith effort to help the crew leaders comply with the Act's standards.[1]

All of petitioner's defenses were rejected by the district court. On the independent contractor point, the court, after reviewing the evidence and the controlling decisions, found it "unnecessary to decide whether the 'crew leaders' are 'independent contractors' or 'employees' of [petitioner], for in the situation here presented, the result will be the same under the Act" in view of this Court's holding in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, that "where the work done, in essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act" (Pet. App. 38). In determining that an injunction should issue to restrain petitioner from continuing to violate the Act, the district court stated that "[a] person or corporation may not take an 'ostrich-like attitude' and still be in good faith under the Act" (Pet. App. 41).[2]

---

[1] Petitioner also denied knowledge of any violations of the Act, and claimed that, in any event, the child labor violations were *de minimis*.

[2] With respect to the claimed lack of knowledge concerning the violations, the district court found that petitioner not only had the right to inspect the crew leaders' records at any time, but that its "relations with the harvest hands were such as to put it in the position to know or discover the wages paid to each 'crew member'" (Pet. App. 41). The court further found that petitioner "knew, or should have known, that * * * the 'crew leaders' were violating the child labor provisions of the Act" as well, and that the nine child labor violations discovered during the month of April 1970 were not *de minimis* (Pet. App. 41–42).

In affirming, the court of appeals approved the district court's findings as not "clearly erroneous," both expressly (Pet. App. 30–31) and by quoting extensively from the trial court's memorandum decision (Pet. App. 26–28). In addition, it noted that there was testimony indicating "that [petitioner], through its field supervisors, exercises considerable control over the crew leaders and the harvest workers"; for example, petitioner's head field supervisor tells the crew leaders at what hour to begin work, assigns them a specific area to harvest each day according to the number of members in the crew, and determines "the rate at which they should pay the harvest workers * * *." Moreover, petitioner's field supervisors "oversee the harvest work in the fields each day and give instructions to the crew leaders, who pass them on to the harvest workers" (Pet. App. 28–29). See A. 289–290, 293, 330, 346, 348–349, 352, 368, 373–375, 382–384, 390–393, 397, 404.[3]

On the injunction point, the court of appeals noted that there had been past violations of the Act on petitioner's part, and that "[a]lthough an issue was created as to whether [petitioner] at all times acted in good faith reliance on advice of counsel, the district court was competent to evaluate the testimony and

[3] "A." references are to the Appendix filed in the court of appeals.

Although the harvest workers are paid by the crew leaders, the money for their wages and for all other operating expenses, such as gasoline, license tags for the crew leaders' trucks, and the scissors, knives and baskets used in the harvest operations, is advanced by petitioner (Pet. App. 27; A. 291–292, 302, 332, 353, 375, 378–379, 396–397, 403, 412, 417, 696, 701, 721).

determine the dependability of [petitioner's] promise of future compliance" (Pet. App. 31–32).

ARGUMENT

The decision below is correct. It does not present any novel legal issue, nor does it conflict with any decision of this or other courts. Further review is thus not warranted.

1. Although this is the first appellate case applying the minimum wage protection (extended to farm workers in 1967) to harvest workers, that result has also been reached by the only other court of appeals that has decided the question (*Hodgson* v. *Okada Farms, Inc.*, 472 F. 2d 965 (C.A. 10)) and is entirely consistent with the Fair Labor Standards Amendments of 1966, P.L. 89-601, 80 Stat. 830, 833. Protection was extended by those amendments to limit the former exclusion of agricultural employees from the minimum wage provisions of the Act. It has long been settled that persons exercising the degree of control over workers in other industries that petitioner exercises over the harvest workers here are "employers" within the meaning of the Act. See, *e.g.*, *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900; *Tobin* v. *Anthony-Williams Mfg., Co.*, 196 F. 2d 547 (C.A. 8); *Tobin* v. *La Dake*, 190 F. 2d 677 (C.A. 9); *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C.A. 6), certiorari denied, 333 U.S. 862. And on facts virtually identical to those presented here, the farmer has been held to be an

"employer" of the harvest workers hired under the crew leader system to work on his farm since these workers are, "as a matter of economic reality," dependent upon the farmer for their wages. *Fahs* v. *Tree-Gold Co-op. Growers of Florida*, 166 F. 2d 40, 44 (C.A. 5) (Social Security Act). See, also, *Mitchell* v. *Hertzke*, 234 F. 2d 183 (C.A. 10) (child labor provisions of Fair Labor Standards Act).[4]

Petitioner's contention that the harvest worker cannot be an employee of both the farmer and the crew leader (Pet. 12) is contrary to decisions recognizing the existence of a joint employment relationship. In *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481, the argument advanced by petitioner was rejected by this Court which stated, in interpreting the National Labor Relations Act, "[w]hether Greyhound [here Griffin and Brand] * * * qualif[ies] as a joint employer with Floors [here the crew leaders] is a question which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves [here the harvest hands] occupy an independent contractor status." See, also, *Hodgson* v. *Okada Farms, Inc.*, 472 F. 2d 965 (C.A. 10); *Hodgson* v. *Arnheim and Neely, Inc.*, 444 F. 2d 609, 611–612 (C.A. 3), reversed on other grounds *sub nom. Brennan* v. *Arnheim and Neely, Inc.*, No. 71–1598, decided February 28, 1973. Accordingly, the court below never reached the question

[4] As the court below noted (Pet. App. 30), this Court has stated that decisions defining the employer-employee relationship for purposes of the National Labor Relations and Social Security Acts are persuasive in interpreting the Fair Labor Standards Act. *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 723.

whether the crew leaders were "employees" or "independent contractors," and petitioner's assertion of a conflict with *United States* v. *Silk*, 331 U.S. 704, which, so petitioner claims, requires a holding that the crew leaders are independent contractors, is at best beside the point.

2. Although minimum wage protection was not extended to farm workers until 1967, the Act's child labor and shipping provisions previously applied to farmers and other employers of such workers (*Mitchell* v. *Hertzke*, *supra*), as did the provisions of the Social Security Act (*Fahs* v. *Tree-Gold Co-op. Growers*, *supra*). For more than 25 years, the courts have held the farmer responsible for adhering to these laws. As the Fifth Circuit pointed out in *Fahs*, where the farmer used workers hired by contractors who had full authority to set wages and fix hours of work and who paid their Social Security taxes, "statutory coverage [of these remedial laws] is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business for which they render service" (166 F. 2d at 44).

Petitioner's contention that industry custom should shield the farmer from any wage liability under the Fair Labor Standards Act not only is contrary to the established "economic reality" test, but would, we submit, substantially frustrate the stated intent of Congress, in enacting the Fair Labor Standards Amendments of 1966, to provide minimum wage protection to the employees of "large agri-business enterprises" (H.

Rep. No. 871, 89th Cong., 1st Sess. (26) and, in particular, to improve the plight of the migrant workers (112 Cong. Rec. 11308, 11391, 20484).

3. Petitioner's contention that the district court abused its discretion in granting injunctive relief ignores that court's findings, sustained by the court of appeals, that petitioner had not acted in good faith. Petitioner did not, as it claims, have a "perfect record of compliance" with the Fair Labor Standards Act (Pet. 22). The record is undisputed that petitioner had been investigated three times since 1969, that each investigation had disclosed violations which were discussed with petitioner's president, and that petitioner had been advised two years before suit was filed that it was responsible as an "employer" of the harvest workers for assuring that their employment was in compliance with the Act's minimum wage, record keeping and child labor provisions (A. 483–499, 516–529, 532, 539–542, 617–622, 624–626, 628, 630–631, 769).[5]

[5] Therefore, petitioner could not reasonably have continued to rely upon the opinion letters written in 1967 (Pet. App. 50–52). The assertion in the July 19, 1967 opinion letter that if a crew leader were an independent contractor, compliance with the Fair Labor Standards Act would not be the responsibility of the farmer is no longer the position of the Department, in light of the cases cited *supra*, at p. 6. In any event, it is clear from these letters that the identification, for purposes of the Fair Labor Standards Act, of the relationships between the farmer, the crew leaders, and the harvest workers in any given case must be based on an analysis of the total factual situation involved. Both courts below considered the total factual situation here, and properly concluded that petitioner was an employer of the harvest workers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor.

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